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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

TERRI KWAKE, an individual and citizen
of the State of Oregon,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING, INC.,
a Utah Corporation,

Defendant.

Case No. 6:15-cv-01713-MC

**BANK OF AMERICA N.A.'S REPLY TO
SELECT PORTFOLIO SERVICING,
INC.'S RESPONSE TO BANK OF
AMERICA, N.A.'S MOTION TO QUASH**

In its Opposition, Select Portfolio Servicing, Inc. (“SPS”) does not—because it cannot—deny that its Trial Subpoena violates the Federal Rules of Civil Procedure and, thus, is facially invalid. Instead, SPS argues that Bank of America, N.A (“BANA”) somehow waived its rights to oppose the invalid Trial Subpoena because it purportedly “strung SPS along” and is now “go[ing] back on its word.” D.E. 121 at 3-4. This is a blatant mischaracterization of the parties’ prior discussions, and the evidence that SPS itself submitted belies SPS’s position.

First, BANA has never agreed to provide a witness to testify at trial. *See* Declaration of Jessica Reyes (“Reyes Decl.”), ¶ 5. Any contention that the parties had “prior agreements” for BANA to produce a witness is flat false. D.E. 121 at 1. Indeed, the record is clear that when SPS first approached BANA about the possibility of providing a witness to testify at trial—

almost two months after the discovery cutoff—BANA immediately inquired about the scope of the Topics, making no promises that it would provide a witness. *See* D.E. 122-1 (“It would be helpful for us to get a better understanding of the scope of testimony you are looking for.”). Soon thereafter, BANA made clear that SPS’s late request for a witness was problematic, that locating a potential witness “has been difficult,” and that BANA was “still trying to identify someone who may be able to speak about the limited topics [the parties’] discussed.” *See* D.E. 122-3 (emphasis added). And precisely because BANA would not agree to commit to providing a witness, SPS then tried to force BANA’s hand by serving an improper subpoena—in response to which BANA timely moved to quash. In sum, not only did BANA never agree to provide a witness to testify at trial, SPS was aware at all times that this might not be possible.

Second, SPS’s contention that BANA’s previous cooperation in good faith somehow constitutes a prospective waiver as to all discovery requests going forward is not even colorable and must be rejected. *See, e.g.*, D.E. 121 at 5 (“Since the beginning of this case, BANA has cooperated with SPS in defending against Plaintiff’s claims.”). BANA has in fact tried to assist in providing relevant information where possible, but that does not mean that it has waived its rights to refuse subsequent requests—and certainly not where, as here, the requests are invalid on their face. If that were the law, no parties would ever cooperate.

Finally, SPS’s argument that BANA’s Motion to Quash should be denied for lack of evidence is meritless on its face. As an initial matter, as even SPS admits, no Ninth Circuit authority permits service of a Rule 45 trial subpoena without identification of a specific witness, and this Court should grant BANA’s motion on that basis alone. *See* D.E. 121 (“SPS recognizes that the Ninth Circuit has held that Rule 45 generally requires that subpoenas designate the individual desired to testify.”). Further, the sole reason that SPS served BANA’s local branch in Eugene is to attempt to circumvent Rule 45’s geographical limits, which SPS does not deny. In good faith, counsel for BANA has inquired into whether BANA has a witness that could testify on the Topics in Oregon. That is evidence enough. SPS’s position that BANA must attest to the

knowledge and experience of “every BANA employee living or working in Oregon” is preposterous. D.E. 121 at 4. As SPS well knows, BANA has no witness who lives, works, or regularly transacts business in person in Oregon who directly serviced Plaintiff’s loans or has any knowledge that is relevant to this case. *See* Reyes Decl. at ¶ 6. And the individuals who manage BANA’s relationship with sub-servicers—which is the crux of the testimony that SPS now seeks—are in California, Texas, or Illinois. *See id.* at ¶ 7.

For the foregoing reasons, BANA respectfully requests that this Court GRANT its Motion to Quash, and given that trial is scheduled to begin next Tuesday, February 21, 2017, that this Court issue an order as soon as possible.

DATED: February 17, 2017.

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CERTIFICATE OF SERVICE

I certify that on this 17th day of February, 2017, the foregoing **BANK OF AMERICA N.A.'S REPLY TO SELECT PORTFOLIO SERVICING, INC.'S RESPONSE TO BANK OF AMERICA, N.A.'S MOTION TO QUASH** will be served in accordance with the Court's CM/ECF system which will send notification of such filing by notice via email to the ECF participants of record a true copy of the foregoing document.

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